FLEISCHMAN AND WALSH, L. L. P.

ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
1400 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20036
TEL (202) 939-7900 FAX (202) 745-0916
INTERNET fw@fw-law.com

DOCKET FILE COPY ORIGINAL

AARON I. FLEISCHMAN

FLEISCHMAN AND WALSH, P. C.
CHARLES S. WALSH
ARTHUR H. HARDING
STUART F. FELDSTEIN
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JEFFRY L. HARDIN
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RUBY D. CEASER
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LORETTA J. GARCIA
DEBRA A. McGUIRE
JOSHUA W. RESNIK****

* VA BAR ONLY
** PA BAR ONLY
*** NY AND NJ BARS ONLY
**** MD BAR ONLY

April 7, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Reply Comments of Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc. and Nextlink Communications, L.L.C. in Docket No. 97-90; CCB/CPD 97-12

Dear Mr. Caton:

Transmitted herewith for filing on behalf of Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc. and Nextlink Communications, L.L.C. , Inc. are an original plus eleven copies of its "Reply Comments" in the above-referenced matter.

If there are any questions regarding this matter, please communicate with the undersigned.

Sincerely,

Mitchell F. Brecher

Enclosures

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52182.1/0456.0001

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20036

In the Matter of	)	CC Docket No. 97-90
	)	CCB/CPD 97-12
Requests of U S West Communications, Inc. for Interim Cost Adjustment Mechanisms	)	

REPLY COMMENTS OF ELECTRIC LIGHTWAVE, INC., MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. AND NEXTLINK COMMUNICATIONS, L.L.C.

Mitchell F. Brecher
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 939-7900

Counsel for Electric Lightwave, Inc.

Casey D. Mahon
Senior Vice President and General Counsel
Suite 500, 221 3rd Avenue, SE
Cedar Rapids, Iowa 52401

Counsel for McLeodUSA Telecommunications Services, Inc.

Bruce Easter
155 108th Avenue, NE
8th Floor
Bellevue, Washington 98004

Counsel for NEXTLINK Communications, L.L.C.

April 28, 1997

resold services be based on a retail rate less avoided costs standard. That standard would be violated if ILECs were free to assess surcharges on resale. This is also true for interconnection and unbundled network elements. U S West's state ICAM filings should be seen by the Commission for what they are -- efforts to deter local competition and to relitigate before state commissions arbitrated interconnection decisions which are not satisfactory to it.

Petitioners do not claim that ILECs are not entitled to recover their costs of providing service and to earn reasonable returns on their investments, consistent with applicable state law. However, if they are underearning, their remedy is to seek rate increases through state rate case procedures, not to ask for special permission to implement ICAM-type surcharges on their competitors. Therefore, Petitioners reiterate their request that the Commission utilize the procedure set forth at paragraph 125 of the Local Competition Order, and issue a declaratory ruling that surcharges like the ICAM surcharges sought by U S West are violative of the Act. Further, if any state allows U S West to assess such surcharges on competitors or end users, then Petitioners ask the Commission to issue an order preempting such state approvals pursuant to Section 253 of the Act.

SUMMARY

U S West and other ILECs should not be permitted to recover their "get ready for competition" costs either from competitors or from end users in the form of special surcharges such as those proposed by U S West in its Interconnection Cost Adjustment Mechanism (ICAM) filings with state commissions throughout its service territory. Contrary to the assertion of U S West and its ILEC brethren, the network upgrade and rearrangement charges sought to be recovered from competitors in the form of ICAM surcharges are not costs being incurred for the benefit and convenience of competitors. The beneficiaries of local telecommunications competition will be the millions of consumers, including those who will use the upgraded and expanded networks of ILECs. For states to acquiesce in imposition of such additional ILEC surcharges on CLECs would amount to ILEC-assessed, state sanctioned franchise fees in contravention of the prohibition of barriers to competition set forth at Section 253 of the Act.

Contrary to GTE's assertion that CLECs are not required to use ILEC facilities to provide local service, all LECs must interconnect with each other in order to terminate their respective customers' traffic on their networks. It is for that reason that the 1996 Telecommunications Act mandates reciprocal termination compensation limited to the additional costs of terminating each other's traffic, and does not contemplate incumbents saddling their competitors with their costs of upgrading their network to terminate CLEC traffic beyond the reciprocal termination compensation requirement of Section 252. Neither may ILECs rely upon the wholly inapposite analogy of specially-provided facilities and services to justify recovery through ICAM surcharges of their network improvement and rearrangement charges.

Section 252 specifies the means for establishing charges for interconnection, unbundled network elements and resale. Efforts by ILECs to impose fees for those arrangements beyond those contemplated by the Act are not permissible. For example, Section 252(d)(3) requires that

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	CC Docket No. 97-90
	)	CCB/CPD 97-12
Requests of U S West Communications, Inc. for Interim Cost Adjustment Mechanisms	)	

REPLY COMMENTS OF ELECTRIC LIGHTWAVE, INC., MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. AND NEXTLINK COMMUNICATIONS, L.L.C.

Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., and NextLink Communications, L.L.C. (hereinafter "Petitioners"), by their attorneys, hereby submit their reply comments in the above-captioned matter, and state as follows:

INTRODUCTION

On February 20, 1997, Petitioners filed with the Commission a petition for declaratory ruling and contingent petition for preemption ("Joint Petition"). Petitioners brought to the Commission's attention the fact that U S West Communications, Inc. ("U S West") had made filings before the state regulatory commissions throughout its fourteen state service territory asking to recover certain network upgrade and rearrangement costs associated with impending local telecommunications competition through imposition of surcharges which U S West calls Interconnection Cost Adjustment Mechanisms ("ICAM"). As noted by Petitioners, U S West seeks authority from state regulators to recover from competing local service providers (CLECs) its costs associated with software changes for service assurance, capacity provisioning, billing and service delivery, network expansion, and establishment of service centers to process orders. These charges would be in addition to the charges for interconnection, unbundled network

elements, and resale contemplated by Sections 251 and 252 of the Communications Act and approved by state utility commissions in arbitration proceedings conducted pursuant to Section 252 of the Act. U S West seeks to raise through these ICAM charges 500 million dollars to one billion dollars over the next several years.[1] Alternatively, U S West has proposed to recover these ICAM surcharges through per subscriber line charges on end users.

In the Joint Petition, Petitioners showed that the costs which U S West is seeking to recover through its various ICAM filings would exceed the charges permissible under Section 252 and would constitute a barrier to entry in violation of Section 253. U S West and several other incumbent local exchange carriers (ILECs) opposed the Joint Petition largely on the basis that they should be entitled to recover their "get ready for competition" costs from their competitors irrespective of the statutory standards for pricing of interconnection, unbundled network elements and resale.[2]

Judging by the broad support indicated by the comments of existing and prospective U S West competitors, others share the concerns reflected in the Joint Petition.[3] Two state commissions have opposed the federal preemption aspect of the Joint Petition, arguing that cost

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[1]Joint Petition at 3.

[2]In addition to U S West, other commenters supporting U S West's right to recover ICAM surcharges from its competitors include Bell Atlantic and NYNEX, Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (Southwestern Bell), GTE Service Corporation, and Aliant Communications Company.

[3]Commenters in support of the Joint Petition include American Communications Services, Inc. (ACSI), the Association for Local Telecommunications Services (ALTS), AT&T Corp. (AT&T), the Competitive Telecommunications Association (CompTel), Cox Communications, Inc. (Cox), GST Telecom, Inc. (GST), ICG Telecom Group, Inc. (ICG), MCI Telecommunications Corporation (MCI), Sprint Corporation (Sprint), Teleport Communications Group, Inc. (TCG), the Telecommunications Resellers Association (TRA), and WorldCom, Inc. (WorldCom).

recovery aspects of local competition should be left to the states.[4] However, neither commenting state commission disputed with Petitioners' contention that U S West's proposed ICAM surcharges are inconsistent with the pricing standards for interconnection, unbundled network elements and resale codified in the Communications Act. As will be explained in these reply comments, Petitioners have no desire to limit the authority of states to resolve state cost recovery issues, provided that states not permit recovery in a manner which is inconsistent with the Communications Act and with the federal objectives embraced by Congress in enacting the Telecommunications Act of 1996. If, as asserted by U S West and its ILEC brethren, those companies are incurring costs to expand and upgrade their networks in anticipation of local service competition, they may seek to recover those costs through the general rate case procedures or other regulatory methods (*e.g.*, price cap rate adjustments) established by state commissions to be applicable to all requests for rate relief by ILECs. Petitioners have asked the Commission to issue a declaratory ruling that U S West and other ILECs not be allowed to impose special surcharges either on their competitors or on end users to recover their network expansion and improvement costs.

I. U S West's Asserted Right to Recover ICAM Surcharges From its Competitors Is Based on an Incorrect Premise -- That Those Charges are Being Incurred by U S West for the Benefit of its competitors

Throughout the opposition of U S West to the Joint Petition, as well as the supporting comments of its ILEC brethren, is a recurring theme -- that the costs which U S West seeks to recover from competitors through ICAM surcharges are being incurred by U S West solely for the benefit and convenience of those competitors and therefore should be recovered from the

[4]The two commenting state commissions are the Washington Utilities and Transportation Commission (WUTC) and the California Public Utility Commission (California PUC).

"beneficiaries" of those expenditures.[5] Contrary to that assertion, the costs which U S West seeks to recover through ICAM surcharges are not being incurred for the enjoyment and convenience of competitors, they are being incurred to make possible the development of local telecommunications competition. The real beneficiaries of those expenditures are not U S West's competitors, but rather are the millions of consumers -- business and residential -- who will enjoy new services, lower prices, increased choices and other service and product enhancements. Therefore, the premise underlying U S West's ICAM filings -- that its competitors are to be the beneficiaries of its network upgrades and expansion -- is an incorrect premise.

As noted by WorldCom, Inc., the preamble to the 1996 Telecommunications Act describes the Act as "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage development of new telecommunications technologies."[6] Similarly, the California PUC has recognized that expenses incurred by ILECs to accommodate local competition are not for the benefit of individual competitors, but rather for the benefit of society. In its comments on the Joint Petition, the California PUC quotes from its Decision No. D.96-03-020 at p. 90. There, the California PUC held as follows:

> . . . the LECs will need to perform various activities. . . to implement the infrastructure for local exchange competition and that some level of costs will be incurred by the LECs associated with these activities. Moreover, we expect society as a whole to

[5]For example, U S West states in its opposition that " . . . the notion in the Petition that Petitioners are entitled to have ILEC networks reconfigured for their benefit for free is a notion which has never found any support in the decisions of this Commission." Opposition of U S West at 6 (emphasis added).

[6]Comments of WorldCom at 3.

benefit from the implementation of local exchange competition.[7]

Indeed, U S West and other ILECs will benefit from these expenditures every bit as much as their competitors. A substantial portion of the costs included in U S West's ICAM claims is for upgrading and expansion of U S West's own network facilities to accommodate traffic demands on U S West's network. In other words, U S West will be expending funds to expand and upgrade its network facilities to enable it to interconnect with its competitors and to receive traffic from its competitors. Pursuant to the provisions of the 1996 Telecommunications Act, the Commission's rules, and the decisions of state utility commissions throughout its region, U S West will be compensated for terminating the traffic of its competitors. To the extent that network expansion and upgrading is necessary in order for U S West to carry the additional traffic brought to it by its competitors, it will enjoy compensation for that carriage. U S West also will be upgrading and expanding its network to improve its service quality in order to compete more effectively and efficiently with new entrants. Accordingly, neither U S West nor any other ILEC has any need or entitlement to recover separately the network upgrade and expansion costs from those competitors whose networks will interconnect with U S West or other ILECs and who will be delivering traffic to U S West and other ILECs.[8]

This incorrect notion that only competitors to ILECs will benefit from ILEC compliance with the local competition provisions of the 1996 Act also seems to be embraced by GTE. GTE

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[7]California PUC Decision No. D.96-03-020, as quoted at comments of California PUC at 4 (emphasis added).

[8]Taking U S West and GTE's logic on this point to its illogical extreme, petitioners and other competitors would be similarly entitled to impose on U S West, GTE, and other ILECs their own ICAM-type charges to recover their costs of constructing network capacity to receive and terminate traffic from those companies and to develop the systems for identifying and counting that ILEC-originated traffic.

claims that "[N]o CLEC is required to use ILEC facilities to provide local service."[9] This statement is, of course, facially incorrect. While CLECs are free to construct their own networks, they will continue to need to be able to access ILEC networks in order to deliver traffic from their customers to ILEC terminating locations. Implicit in GTE's assertion is the notion that local telecommunications competition will eventuate through the construction and operation of separate and non-connected competing networks. Such a notion is, of course, absurd. Competing local providers -- ILECs and CLECs -- will need access to each other's networks in order to terminate their customers' calls to called locations on other networks. Just as CLECs will need to access GTE's network so that CLEC customers can complete calls to persons served by GTE, so too, will it be necessary for GTE to be able to access its competitors' networks so that GTE customers may complete calls to persons served by those competitors. This mutual need to utilize each other's facilities is why Section 252 of the Act specifically requires reciprocal termination -- and compensation therefor, and why that termination compensation is to be limited to the additional costs of terminating each other's traffic, and, more specifically, why the Act does not contemplate recovery of ILECs' network upgrade costs through ICAM-type surcharges.

Both U S West and GTE attempt to justify their asserted entitlement to ICAM cost recovery from their competitors by inappropriately comparing those costs to unique, carrier-specific costs incurred by ILECs to meet special facilities and service requests of individual competitors. Each of those companies cites out of context irrelevant and readily distinguishable examples taken from the Commission's First Report and Order in CC Docket No. 96-98.[10]

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[9]GTE Comments at 9.

[10]In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *et al* (*First Report and Order*), FCC 96-325, released August

It is, of course, correct that where a requesting competitor seeks from an ILEC a "technically feasible, but expensive interconnection" arrangement, or where it seeks modification of ILEC facilities such as loop conditioning or to obtain IDLC-delivered loops, the specific costs incurred by the ILEC to meet those unique requests should be recovered from the requesting CLEC.[11] U S West's proposed ICAM surcharges are not designed to recover from individual competitors the special costs it will incur to meet specific interconnection requests of those individual competitors which deviate from normally-provided arrangements. Instead, through ICAM, U S West claims a right to recover from local competitors the costs which U S West will incur to compete with all of those competitors. Nothing in the First Report and Order supports such a peculiar cost recovery proposition, and the reliance of U S West and GTE on the totally irrelevant circumstance of specially-requested facilities and arrangements by individual competitors is misplaced.

Moreover, ICAM surcharges are not permissible cost recovery mechanisms within the Communications Act as amended by the 1996 Telecommunications Act. By its ICAM filings, U S West is asking state commissions to approve what are, in effect, competitive entry or "franchise fees," on CLECs for the privilege of being allowed to compete with U S West. Clearly, no state should permit ILECs to establish such franchise or market entry fees, and, given the pendency of fourteen such requests in states in U S West territory, the Commission, pursuant to its authority under Sections 4(i) and 253 of the Act, and pursuant to its offer stated in the First Report and Order[12] to provide clarifying advice and declaratory rulings on matters

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8, 1996.

[11]These examples are cited by US West at p. 5 of its opposition and by GTE at p. 6 of its comments.

[12]First Report and Order, *supra* at ¶ 125.

related to local competition and interconnection, should indicate to ILECs and to state commissions that such ILEC-imposed entry fees are not permissible under the Act.

II. ILEC Recovery of Charges from CLECs Beyond Those Permitted by Section 252 Would Violate the Act

Implicit in U S West's ICAM filings and in the comments filed in support of U S West is the notion that ILEC cost recovery for interconnection, unbundled network elements, and resale is not limited by Section 252 of the Act, and that ILECs may freely approach their state regulators for permission to impose additional charges on their competitors beyond those permitted by the Act. That is incorrect.

Just as Section 251 of the Act establishes statutory obligations on ILECs to provide interconnection, unbundled network elements, and resale at wholesale rates of retail services provided to end users, Section 252 establishes the cost recovery rules for providing these arrangements. While the Act delegates to the states the power to conduct arbitration proceedings and to establish prices based on those statutory requirements, Section 252 does not authorize ILEC cost recovery which exceeds the statutory requirements. U S West's ICAM filings are attempts to obtain from state commissions permission to gain compensation beyond that allowed by the Act.

Nowhere is the inconsistency of ICAM filings with Section 252 cost recovery standards more clearly shown than with respect to resale. Section 251(c)(4)(A) imposes on U S West and other ILECs the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. The pricing standard for such resale at wholesale rates is set forth at Section 252(d)(3). That provision is as follows:

> . . . a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the

> telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Section 252(d)(3) is explicit and unambiguous. ILECs may charge their competitors rates for services to be resold based on their retail rates less only billing, collection, and other costs that will be avoided. ILEC efforts to supplement rates derived on that requirement by adding in ICAM surcharges would result in resale rates which violate the pricing standard stated at Section 252(d)(3). Nothing in the Communications Act authorizes the Commission or any state commission to allow ILECs to extract surcharges which result in CLECs being forced to pay more than the statutory retail less avoided cost rate standard contained therein. Yet, that is precisely what U S West seeks to do through its ICAM surcharges. Those surcharges would similarly violate the pricing standards for interconnection and unbundled network elements codified at Section 252(d). Neither U S West nor any of its fellow ILECs who commented in support of the ICAM surcharge proposals have provided any legal justification for state disregard of the pricing standards codified at Section 252(d).

Furthermore, as noted by TCG, U S West's ICAM proposals were not filed until after U S West had completed a series of state arbitration proceedings in which it attempted unsuccessfully to persuade state commissions to allow it to impose unbundled element, transport and termination rates higher than those allowed by the statutory standards, and to establish avoided cost wholesale rate discount levels lower than the statutory standards.[13] In short, U S West's ICAM state filings not only represent an effort to have states adopt pricing requirements more favorable to ILECs than those contemplated either by the Act or by the Commission's rules implementing the Act, those filings are also attempts by U S West to

[13]TCG comments at 2.

"relitigate" state pricing decisions with which it is unhappy and to obtain permission to recover allegedly incurred costs beyond those which it has persuaded state commissions it is entitled to recover based upon the requirements of Section 252. Nothing in the 1996 Act states or suggests that ILECs may contest state arbitration decisions deemed unsatisfactory to their interests through the guise of special surcharge filings to recover the amounts which the ILECs were unable to persuade state commissions to allow them to charge competitors for interconnection, unbundled network elements, transport and termination, and for resold services.

III. Costs Incurred by ILECs in Anticipation of Local Competition Not Recoverable from Competitors Pursuant to Section 252 May be Recovered From Consumers Through General Rate Cases

U S West's opposition and the comments of other ILECs are laced with rhetoric about not having to work for free, about being entitled to compensation for their costs of service, etc. Notwithstanding that rhetoric and veiled references to unconstitutional takings,[14] subsidies,[15] and slavery (forced servitude),[16] nothing in the Joint Petition either states or implies that ILECs are not entitled to reasonable compensation for their costs legitimately and prudently expended in providing service to customers. If U S West and other ILECs believe that their current rates are not enabling them to recover their costs, they are free to file with their state utility commissions general rate cases and to demonstrate to those commissions that they are underearning and that they are entitled to rate increases necessary to bring their earnings to

[14]See, *e.g.*, opposition of U S West at 8, comments of GTE at 4.

[15]See, *e.g.*, comments of GTE at 14.

[16]Opposition of U S West at 8.

appropriate levels.[17] What they are not free to do is to recover all -- or even portions of -- any asserted revenue shortfall though special surcharges on their competitors or through surcharges on end users identified as surcharges to finance their costs of getting ready for competition.

Petitioners do not object to U S West attempting to demonstrate that it should be allowed to recover from its universe of ratepayers rates which recover all of its costs, provided, however, that U S West can show that the costs were properly incurred, and that service has been provided in an efficient manner. Petitioners do object, however, to the ICAM filings since those filings constitute efforts to recover the entirety of U S West's "get ready for competition" costs from existing and prospective competitors, not from all consumers. As noted by the California PUC and others, ILEC costs of implementing local competition benefit society as a whole -- including ILECs themselves. Their benefit is not limited to CLECs. Any ILEC attempt to impose the entire burden of those costs on CLECs such as U S West's ICAM is inconsistent with that benefit, is violative of Section 252 of the Act, is a barrier to competition in violation of Section 253 of the Act, and should not be allowed by any state.[18] To the extent that there is a possibility that a state commission may allow recovery of network upgrade and rearrangement costs from ILEC competitors as proposed by U S West, the Commission should obviate that possibility by issuing forthwith a declaratory ruling that such recovery would violate the Act. In addition, if any state in U S West territory allows imposition of ICAM surcharges, then Petitioners reiterate their request that the Commission issue a ruling preempting such state

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[17]In the states where U S West has obtained non-rate of return-based regulation, *e.g.*, price caps or other forms of incentive regulation, there typically are procedural opportunities for ILECs to seek price cap or other rates adjustments.

[18]As noted by TRA, U S West and other ILECs have the right to seek to recover amounts expended in upgrading their networks, but they may not recover those costs in a manner which targets CLECs as the exclusive source of recovery or which impedes competitive entry into local exchange markets. TRA comments at 8.

action as constituting a barrier to competition in contravention of Section 253.

CONCLUSION

For the reasons stated in these reply comments as well as those set forth in the Joint Petition, Petitioners hereby respectfully urge the Commission to issue the requested declaratory ruling that U S West's proposed ICAM surcharges are violative of the Act. If any state allows U S West to assess such surcharges on competitors or on end users in the manner contemplated by the ICAM filings, then Petitioners request that the Commission issue an order preempting such surcharges.

Respectfully submitted,

ELECTRIC LIGHTWAVE, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
NEXTLINK COMMUNICATIONS, L.L.C.

By: _____
Mitchell F. Brecher

FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 939-7900

Counsel for Electric Lightwave, Inc.

Casey D. Mahon
Senior Vice President and General Counsel
Suite 500, 221 3rd Avenue, SE
Cedar Rapids, Iowa 52401

Counsel for McLeodUSA Telecommunications Services, Inc.

Bruce Easter
155 108th Avenue, NE
8th Floor
Bellevue, Washington 98004

Counsel for NEXTLINK Communications, L.L.C.

April 28, 1997

52124.1/0456.0001

CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, hereby certify that on this 28th day of April, 1997 copies of the foregoing *Reply Comments of Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc. and NextLink Communications, L.L.C.* were served to the parties listed on the attached service list.

Antoinette R. Mebane

SERVICE LIST

VIA HAND DELIVERY

Regina Keeney
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554

James D. Schlichting
Chief, Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W
Room 518
Washington, DC

Richard K. Welch
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 544
Washington, DC 20554

Anu Seam
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 518
Washington, DC 20554

VIA REGULAR MAIL

Robert B. McKenna
U S West, Inc.
1020 19th Street, NW
Washington, DC 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, NW, Suite 701
Washington, DC 20006

Teresa Marrero
Senior Regulatory Counsel - Federal
Teleport Communications Group, Inc.
Two Teleport Drive
Staten Island, NY 10311

Robert A. Mazer
Albert Shuldiner
Counsel to Aliant Communications Co.
Vinson & Elkins, L.L.P.
1544 Pennsylvania Avenue, NW
Washington, DC 20004-1008

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Counsel to SW Bell Telephone Co.
One Bell Center, Suit 3518
St. Louis, MO 63101

Marlin D. Ard
Randall E. Cape
John W. Bogy
Counsel to SW Bell Telephone Co.
140 New Montgomery Street
San Francisco, CA 94105

Gail L. Polivy
GTE Service Corporation
Counsel to GTE Service Corporation
1850 M Street, NW, Suite 1200
Washington, DC 20036

R. Michael Senkowski
Robert J. Butler
Suzanne Yelen
Counsel to GTE Service Corporation
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

David N. Porter
Vice President-Government Affairs
WorldCom, Inc.
1120 Connecticut Avenue, NW
Suite 400
Washington, DC

VIA REGULAR MAIL CONTINUED

Riley M. Murphy
Charles H.N. Kallenbach
James C. Falvey
American Communications Services, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
Danny E. Adams
John J. Heitmann
Counsel to American Communications Services, Inc.
Kelley Drye & Warren, L.L.P.
1200 19th Street, Suite 500
Washington, DC 20036

Richard J. Metzger
General Counsel
Association for Local Telecommunications
1200 19th Street, NW
Suite 560
Washington, DC

Genevieve Morelli
Executive Vice President and General Counsel
Competitive Telecommunications Association Services
1900 M Street, NW, Suite 800
Washington, DC 20036

Robert J. Aamoth
Kelley Drye & Warren, L.L.P.
1200 19th Street, NW
Suite 500
Washington, DC 20036

Laura H. Phillips
Christopher D. Libertelli
Counsel to Cox Communications, Inc.
Dow, Lohnes & Albertson, PLLC
1200 new Hampshire Avenue, NW
Washington, DC 20036

Douglas G. Bonner
Mark Sievers
Counsel to GST Telecom, Inc.
Swidler & Berlin, Chartered
3000 K Street, NW, Suite 300
Washington, DC 20007

Cindy Z. Schonhaut, Sr. Vice President
Julia Waysdorf, Sr. Director
Government Affairs
ICG Telecom Group, Inc.
9605 East Maroon Circle
Englewood, CO 80112

Albert H. Kramer
Jacob S. Farber
Counsel to ICG Telecom Group, Inc.
Dickstein Shapiro Morin & Oshinsky, LLP
2101 L Street, NW
Washington, DC 20037-1526

Roy C. Lathrop
Amy G. Zirkle
Lisa B. Smith
MCI Telecommunications
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Leon M. Kestenbaum
Jay C. Keithley
Norina T. Moy
Counsel to Sprint Corporation
1850 M Street, NW, Suite 1110
Washington, DC 20036

David W. Carpenter
David L. Lawson
Counsel to AT&T Corp.
Sidley & Austin
One First National Plaza
Chicago, IL 60603

Mark C. Rosenblum
Roy E. Hoffinger
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920